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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 33

[FAC 2005-61; FAR Case 2012-008; Item IV; Docket 2012-0008,
Sequence 1]

RIN 9000-AM31

Federal Acquisition Regulation; Bid Protest and Appeal

Authorities

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to address bid protest and appeal authorities.

DATES: Effective Date: [INSERT DATE OF PUBLICATION IN THE
FEDERAL REGISTER.]

FOR FURTHER INFORMATION CONTACT: Mr. Edward Loeb, Procurement Analyst, at 202-501-0650 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-61, FAR Case 2012-008.

SUPPLEMENTARY INFORMATION:

I. Background

Protests are addressed at FAR subpart 33.1, and contract disputes are addressed at FAR subpart 33.2. The Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council determined that FAR part 33 should be amended to (1) note that there are other Federal-court related protest authorities and dispute-appeal authorities that are not covered by FAR part 33 and (2) provide contracting officers with appropriate references to their office of legal counsel and the web site for the rules of the U.S. Court of Federal Claims. FAR 33.001 and 33.105 are added and FAR 33.101, Definitions, and 33.102, General, are amended by this final rule.

II. Publication of this final rule for public comment is not required by statute.

"Publication of proposed regulations", 41 U.S.C. 1707, is the statute which applies to the publication of the FAR. Paragraph (a)(1) of the statute requires that a procurement policy, regulation, procedure or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published

for public comment, because it only refers to the statutory authorities and provides an internal requirement for contracting officers to contact their designated legal advisor for additional information whenever they become aware of any litigation related to their contracts. The FAR does not address the substance of these authorities. These requirements affect only the internal operating procedures of the Government.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule because this final rule does not constitute a

significant FAR revision, and 41 U.S.C. 1707 does not require publication for public comment.

V. Paperwork Reduction Act

The final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subject in 48 CFR Part 33

Government procurement.

Dated: September 7, 2012

Laura Auletta,
Director,
Office of Governmentwide
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Office of Acquisition Policy,
Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR part 33 as set forth below:

PART 33—PROTESTS, DISPUTES, AND APPEALS

1. The authority citation for 48 CFR part 33 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

2. Add section 33.001 to read as follows:

33.001 General.

There are other Federal court-related protest authorities and dispute-appeal authorities that are not covered by this part of the FAR, e.g., 28 U.S.C. 1491 for Court of Federal Claims jurisdiction. Contracting officers should contact their designated legal advisor for additional information whenever they become aware of any litigation related to their contracts.

3. Amend section 33.101 by adding, in alphabetical order, the definition "Protest venue" to read as follows.

33.101 Definitions.

* * * * *

Protest venue means protests filed with the agency, the Government Accountability Office, or the U.S. Court of Federal Claims. U.S. District Courts do not have any bid protest jurisdiction.

4. Amend section 33.102 by revising the first sentence of paragraph (a) to read as follows.

33.102 General.

(a) Without regard to the protest venue, contracting officers shall consider all protests and seek legal advice, whether protests are submitted before or after award and whether filed directly with the agency, the Government Accountability Office (GAO), or the U.S. Court of Federal Claims. * * *

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5. Add section 33.105 to read as follows.

33.105 Protests at the U.S. Court of Federal Claims.

Procedures for protests at the U.S. Court of Federal Claims are set forth in the rules of the U.S. Court of Federal Claims. The rules may be found at <http://www.uscfc.uscourts.gov/rules-and-forms>.

[BILLING CODE 6820-EP]

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